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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND PENNSYLVANIA-OHIO POWER & LIGHT COMPANY, Appellants, *v.* THE VILLAGE OF HUBBARD, OHIO.	No. 228.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT.

The appeal is from the final order or decree of the District Court (Tr. 44) which premanently annulled and enjoined the order of the Interstate Commerce Commission (*Ohio, Rates, Fares, and Charges*, 64 I. C. C. 493, Tr. 18). The proceeding was instituted by the Commission upon petition filed on behalf of the Pennsylvania-Ohio Power & Light Company (Tr. 14). The order is one of the great many of a

similar nature which followed *Ex parte 74*. The order is—

> * * * that the Pennsylvania-Ohio Power & Light Company be, and it is hereby, notified and required, to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in said report to exist in the relation of interstate and intrastate passenger fares, and to establish, put in force, and maintain passenger fares for the transportation of passengers in intrastate commerce between Hubbard, Ohio, and Youngstown, Ohio, which shall not be less than 20 cents when paid in cash, and $5 for 54 rides when a commutation ticket for this transportation is purchased (Tr. 5).

Youngstown and Sharon are situated in Ohio and Pennsylvania, respectively, about 14.5 miles apart. Midway is the village of Hubbard, Ohio. The maximum distances from Youngstown and Sharon to Hubbard are 8.75 and 7.18 miles, respectively (Tr. 14). The company operates an electric line between the cities of Youngstown and Sharon which passes through the village of Hubbard. The electric company maintains a regular interurban passenger service every half hour between Youngstown and Sharon (Tr. 15) and additional separate service between Hubbard and Youngstown and Hubbard and Sharon (Tr. 15).

Under franchise ordinance passed by the village of Hubbard in 1901 there was maintained between Hubbard and Sharon a cash fare of 13 cents, and

between Hubbard and Youngstown a cash fare of 12 cents. Between Hubbard and both cities the franchise required the maintenance of round-trip tickets at the rate of 20 cents, special tickets good for 22 rides for $2, and 54-trip commutation tickets for $3.80. These fares are still in effect on intrastate travel between Hubbard and Youngstown. Effective February 15, 1920, by tariff duly filed with the Commission, the predecessor electric company increased its one-way fare between Hubbard and Sharon to 20 cents, the price of a 54-trip commutation ticket to $5, and canceled the round-trip and special tickets between those points. Subsequently, the present electric company, which succeeded the company which had previously established the foregoing fares, filed with the Commission tariff in which it proposed to establish the same fares between Hubbard and Youngstown as those in effect between Hubbard and Sharon, above enumerated, and also to establish between Youngstown and Hubbard an 8-trip ticket for $1. It also proposed to increase the one-way fare between Sharon and Youngstown from 30 to 35 cents, and the 54-trip commutation ticket between those points from $9 to $10 (Tr. 15). This tariff became effective on interstate travel October 1, 1920, and on November 25, 1920, was adopted by the present electric company. The Public Utilities Commission of Ohio rejected the increase in fares between Hubbard and Youngstown on the ground that it was without jurisdiction to allow the establishment of rates and charges in excess of those prescribed by the fran-

chise contracts with the earlier companies which the present company had succeeded (Tr. 16).

The petition on which the order of investigation was based, the evidence taken, and briefs filed all relate largely to the intrastate fares between Hubbard and Youngstown as compared with interstate fares between Hubbard and Sharon (Tr. 16). Evidence was submitted showing that industries, mercantile establishments, and amusement houses in Sharon compete with those in Youngstown; that residents of Hubbard are employed at each place who travel daily back and forth over the petitioner's line; also that many of Hubbard's residents likewise travel to one or the other of these points to purchase goods or for other purposes; and that in this transportation Sharon and its patrons are discriminated against by reason of the lower intrastate fares between Hubbard and Youngstown. The mayor of Sharon testified that there are workmen living in Hubbard who are employed at Sharon.

There are many ways in which a passenger may defeat the through fare between Sharon and Youngstown. By paying the combination fare to and from Hubbard the through fare is defeated by 3 cents; by paying the 20-cent fare to Hubbard and using a portion of a round-trip ticket between Hubbard and Youngstown, which is good in either direction, the through fare is defeated by either 5 or 6 cents, according to the price paid for round-trip ticket. Other combinations lower than the through fare can be made by using commutation tickets between

Hubbard and Youngstown. While the company's tariff contains a provision against fare splitting the impossibility of enforcing it is asserted (Tr. 17).

In 1920 the operations between Hubbard and Youngstown were conducted at a loss of $31,264.06 as compared with the profit of $18,361.94 between Hubbard and Sharon. The company estimated that in 1921 it would transport 1,897,890 intrastate and 1,180,607 interstate passengers; and that at the present fares the intrastate passenger traffic would yield $162,721 as against $204,808 from the interstate passenger traffic; intrastate traffic, constituting 61.7 per cent of the total traffic, will yield but 44.5 per cent of the total revenue, resulting in a deficit for the entire operation of $7,549.85; under the proposed fares the Youngstown-Hubbard deficit will be turned into a profit of $16,399.25 (Tr. 18).

The electric company has two connections, both east of Hubbard, with the New York Central; and while it does not originate and deliver freight traffic to this line, it received from the New York Central, during the years 1919 and 1920, 922 cars of freight for delivery chiefly at points on the electric company's line. The New York Central forms a connecting link between the line of the electric company and other trunk lines. The electric company also operates a *daily* less-than-carload freight service between Youngstown and Sharon, and on three days a week operates a through car between Sharon and New Castle, Pa., via Hubbard and the Sharon & New

Castle Railroad. The electric company also participates with other electric lines in through freight rates from points on its line to Cleveland, Toledo, Detroit, and other points. In 1919 the less-than-carload freight amounted to 6,240 tons, which produced a revenue of $18,000, and the carload and switching revenue was $6,246.52. The total, $24,246.52, amounted to about 7 per cent of the gross earnings. In 1920 the less-than-carload tonnage was 5,474 and produced a revenue of $21,221, and the carload and switching traffic yielded $5,259. The total, $26,480, was 7.4 per cent of the gross earnings of the company for that year. (Tr. 18.)

The interstate fares between Hubbard and Sharon or between Sharon and Youngstown were found to be relatively lower than fares maintained by other electric interurban railways in Ohio in the same general territory (Tr. 19). It was also found that the transportation services were performed under substantially similar circumstances and conditions and that undue prejudice and preference and unjust discrimination should be removed by establishing intrastate passenger cash and 54-ride commutation fares between Hubbard and Youngstown not less than the interstate passenger fares found reasonable between Hubbard and Sharon.

The District Court held (Circuit Judge Donahue and District Judges Killits and Westenhaver) that the electric company is not an interurban electric railway operated as a part of a general steam railroad system of transportation; nor is it engaged in the

general transportation of freight in addition to its passenger and express business, and, under the interstate commerce act, the Commission was without jurisdiction to hear and determine the controversy. (*Village of Hubbard* v. *United States*, 278 Fed. Rep. 754, Tr. 29, 41.)

II.

POINTS.

(A) THE DISTRICT COURT ERRED IN HOLDING THAT THE PENNSYLVANIA-OHIO POWER & LIGHT COMPANY WAS NOT SUBJECT TO THE INTERSTATE COMMERCE ACTS AND THAT THE COMMISSION WAS WITHOUT JURISDICTION TO ENTER THE ORDER.

Act to Regulate Commerce, February 4, 1887 (24 Stat. 379).

Act to Regulate Commerce, June 18, 1910 (36 Stat. 539, 552).

Transportation Act of 1920, sec. 422, par. (1) (41 Stat. 488).

Transportation Act of 1920, sec. 402, par. (22) (41 Stat. 478).

Transportation Act of 1920, sec. 439, which added the new sec. 20–a (41 Stat. 494).

Transportation Act of 1920, sec. 209, par. (a) (41 Stat. 464).

Transportation Act of 1920, sec. 300, par. (1) (41 Stat. 469).

The Shreveport Case, 234 U. S. 342, 351.

American Express Co. v. *Caldwell*, 244 U. S. 617, 624.

Wisconsin Railroad Commission v. *C., B. & Q. R. R. Co.*, 257 U. S. 563.

State of New York v. *United States*, 257 U. S. 591.

Lehigh Valley Railroad v. *Public Service Commission*, 272 Fed. Rep. 758.

City of New York v. *United States*, 272 Fed. Rep. 768.

Omaha & Council Bluffs Street Ry. Co. v. *Interstate Commerce Commission*, 230 U. S. 324.

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Georgia Banking Co. v. *Smith*, 128 U. S. 174, 181.

Chesapeake & Potomac Telephone Co. v. *Manning*, 186 U. S. 238, 242, 243.

White v. *United States*, 191 U. S. 545, 551.

Interstate Commerce Commission, v. *Baird*, 194 U. S. 25, 36, 37.

United States v. *Whitridge*, 197 U. S. 135, 143.

United States v. *Falk*, 204 U. S. 143, 149.

Holden v. *Stratton*, 198 U. S. 202, 213.

Tap Line Cases, 234 U. S. 1, 24.

(B) THE FRANCHISE CONTRACTS BETWEEN THE VILLAGE OF HUBBARD AND THE PENNSYLVANIA-OHIO POWER & LIGHT COMPANY AND ITS PREDECESSOR COMPANIES MAY NOT PREVAIL AGAINST THE POWER AND AUTHORITY OF THE NATIONAL GOVERNMENT TO REGULATE INTERSTATE COMMERCE.

State of New York v. *United States*, 257 U. S. 591.

(C) THE VILLAGE OF HUBBARD IS WITHOUT INTEREST TO MAINTAIN THE BILL.

State of New York v. *United States*, 257 U. S. 591.

City of New York v. *United States*, 272 Fed. Rep. 768.

Lehigh Valley Railroad Co. v. *Public Service Commission*, 272 Fed. Rep. 758.

United States v. *State of Tennessee*, decided May 21, 1923.

Edward Hines Yellow Pine Trustees v. *United States*, No. 91, this Term.

III.

ARGUMENT.

(A) THE DISTRICT COURT ERRED IN HOLDING THAT THE PENNSYLVANIA-OHIO POWER & LIGHT COMPANY WAS NOT SUBJECT TO THE INTERSTATE COMMERCE ACTS AND THAT THE COMMISSION WAS WITHOUT JURISDICTION TO ENTER THE ORDER.

In form and effect the order of the Commission is similar to those upheld in *The Shreveport Case*, 234 U. S. 342, 351; *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624; *Wisconsin Railroad Commission* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563; *State of New York* v. *United States*, 257 U. S. 591; *Lehigh Valley Railroad* v. *Public Service Commission*, 272 Fed. Rep. 758, 767; *City of New York* v. *United States*, 272 Fed. Rep. 768.

If Pennsylvania-Ohio Power & Light Company is subject to the Interstate Commerce Act the decree should be reversed.

In *Omaha & Council Bluffs Street Ry. Co.* v. *Interstate Commerce Commission*, 230 U. S. 324, it was held that the Act to Regulate Commerce approved February 4, 1887 (24 Stat. 379), did not apply to *street* railroads carrying passengers between cities divided by a State line.

In the opinion of the District Court, District Judge Westenhaver reviewed the several references to electric railways and interurban railways as found in the interstate commerce act (278 Fed. Rep. 763, 764).

Section 12 of the Act approved June 18, 1910, amended Section 15 of the prior act (Ch. 309, 36 Stat. 539, 552) and provided:

> * * * The Commission shall not, however, establish any through route, classification, or rate between *street* electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character, * * *.

The Congress was well aware that in 1910 and prior thereto interurban electric railways were extensively engaged in the transportation of both passengers and property in interstate commerce. In *Jurisdiction over Urban Electric Lines*, 33 I. C. C. 536, 539, the Commission, in construing the foregoing amendment, said:

> * * * we must continue to hold, with the qualifications resulting from the decision in the *Omaha case*, *supra*, and the amendment to section 15 of the act to regulate commerce, which would exclude "*street* electric passenger railways," that electric railways engaged in interstate transportation are subject to our jurisdiction. In this connection it is worthy of note that electric lines have from time to time requested us to take jurisdiction over them with respect to various matters arising from the application of the interstate-commerce laws.

The reports of the Commission from the earliest until now abound with cases involving the jurisdiction, power, and authority of the Commission over electric urban and interurban railways. That

the Congress took notice thereof in enacting the Transportation Act can not well be gainsaid.[1]

[1] *Chicago & Milwaukee Electric Co.* v. *Illinois Central*, 13 I. C. C. 20; *Cedar Rapids & Iowa City Railway* v. *Chicago Northwestern*, 13 I. C. C. 250; *Southern California Sugar Co.* v. *S. P. L. A. & S. L. R. R. Co.*, 19 I. C. C. 6; *Boyle* v. *Great Falls & Old Dominion R. R.*, 20 I. C. C. 232; *Beall* v. *Washington, Alexandria & Mt. Vernon Ry.*, 20 I. C. C. 406; *Cincinnati & Columbus Traction Co.* v. *Baltimore & Ohio Southwestern*, 20 I. C. C. 486; *Citizens of Somerset* v. *Washington Railway & Electric Co.*, 22 I. C. C. 187; *Silvester* v. *City & Suburban Ry. of Washington*, 22 I. C. C. 201; *Bitzer* v. *Washington-Virginia Ry.*, 24 I. C. C. 255; *Louisville Board of Trade* v. *Indianapolis, Columbus & Southern Traction Co.*, 27 I. C. C. 499; 34 I. C. C. 640; *Virginia Highlands Citizens Association* v. *Washington-Virginia Ry. Co.*, 30 I. C. C. 593; *Milwaukee Produce & Fruit Exchange* v. *Crosby Transportation Co.*, 30 I. C. C. 653; *Damon* v. *Crosby Transportation Co.*, 33 I. C. C. 448; *City of Steubenville* v. *Tri-State Railway and Electric Co.*, 38 I. C. C. 281; *St. Louis, Missouri-Illinois Passenger Fares*, 41 I. C. C. 584; *Lourie Mfg. Co.* v. *Cincinnati Northern*, 42 I. C. C. 448; 49 I. C. C. 64; *Hartford & New York Transportation Co. Joint Rates*, 43 I. C. C. 417; *Aurora, Elgin & Chicago R. R.* v. *Indiana Harbor Belt Line*, 51 I. C. C. 331; *City of East Liverpool* v. *Steubenville, East Liverpool & Beaver Valley Traction Co.*, 51 I. C. C. 563; *Hurst* v. *Boise Valley Traction Co.*, 51 I. C. C. 697; *Michigan Ry. Co.* v. *Michigan Central*, 49 I. C. C. 255; *Union Traction Co.* v. *A. T. & S. F. Ry. Co.*, 52 I. C. C. 281; *Louisville Passenger Fares*, 52 I. C. C. 366; *St. Louis Electric Terminal Ry.* v. *C. C. C. & St. L.*, 55 I. C. C. 52; *Newspapers on passenger cars*, 57 I. C. C. 743; *Badger Lumber Co.* v. *A. T. & S. F. Ry. Co.*, 58 I. C. C. 97; *Chicago, Lake Shore & South Bend Ry.* v. *Director General*, 58 I. C. C. 135; *Local Fares of Hudson & Manhattan R. R.*, 58 I. C. C. 270; *Electric Railway Mail Pay*, 58 I. C. C. 455; *Chicago, Lake Shore & South Bend Ry.* v. *Director General*, 58 I. C. C. 647; *Joint Passenger Fares*, 59 I. C. C. 170; *Class & Commodity Rates of Kansas City Railways Co.*, 59 I. C. C. 382; *Cancellation of Joint Through Rates in Connection with the Missouri & Kansas Ry. Co.*, 59 I. C. C. 404; *Local and Joint Passenger Fares*, 59 I. C. C. 430; *Beall* v. *Wheeling Traction Co.*, 60 I. C. C. 600; *Commuters Club* v. *Washington, Baltimore & Annapolis Electric Co.*, 61 I. C. C. 302; *Montana Rates & Fares*, 61 I. C. C. 500; *Intrastate Fares of the Chicago, North Shore & Milwaukee R. R.*, 62 I. C. C. 188; *Fares of Washington-Virginia Ry. Co.*, 60 I. C. C. 200; *City of New Albany, Indiana*, v. *Louisville & Northern Ry. & Lighting Co.*, 64 I. C. C. 468; *In re intrastate rates within the State of Illinois*, 66 I. C. C. 350; *Cancellation of class rates from Indiana to Ohio destinations*, 66 I. C. C. 449; *In re intrastate passenger fares of Chicago, Lake Shore & South Bend Ry. between points in Indiana*, 69 I. C. C. 180; *Providence Fruit and produce Exchange* v. *Rhode Island Co.*, 69 I. C. C. 422; *Buckeye Pipe Line Co.* v. *Baltimore & Ohio*, 73 I. C. C. 19; *Hood Coal Co.* v. *Monongahela Valley Traction Co.*, 73 I. C. C. 54; *Michigan R. R. Co.* v. *Pere Marquette*, 74 I. C. C. 496; *Farmers, etc.*, v. *Fox & Illinois Union Ry.*, 74 I. C. C. 593; *In re intrastate rates within Illinois*, 77 I. C. C. 173.

The Commission reports involving interurban electric railways embrace practically every phase of regulation provided by the interstate commerce act.

The regulation of such companies had increased to such an extent that in the Transportation Act of 1920 the Congress enacted the following provisions.

Transportation Act of 1920, section 422, which added the new section 15–a, paragraph (1) (Ch. 91, 41 Stat. 488):

> When used in this section * * * the term "carrier" means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this Act, excluding (*a*) sleeping-car companies and express companies, (*b*) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (*c*) *interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight, and* (*d*) * * *.

Transportation Act of 1920, section 402, paragraph (22) (Ch. 91, 41 Stat. 478):

> The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, *which are not operated as a part or parts of a general steam railroad system of transporation.*

Transportation Act of 1920, section 439, which added the new section 20–a (Ch. 91, 41 Stat. 494):

> That as used in this section the term "carrier" means a common carrier by railroad (except a street, suburban, or interurban electric railway *which is not operated as a part of a general steam railroad system of transportation*) which is subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act.

Transportation Act of 1920, section 209, paragraph (a) (Ch. 91, 41 Stat. 464):

> When used in this section—
>
> The term "carrier" means (1) a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal control at the time Federal control terminates * * *; but does not include a street or interurban electric railway not under Federal control at the time Federal control terminates, which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both.

Title III of the Transportation Act of 1920 (which creates the Labor Board), Section 300, provides (Ch. 91, 41 Stat. 469):

> When used in this title—
>
> (1) The term "carrier" includes any express company, sleeping-car company, and any carrier by railroad, subject to the Interstate Commerce Act, *except a street, interurban, or*

suburban electric railway not operating as a part of a general steam railroad system of transportation.

"Summarizing and bringing together" these references, the learned District Court said (278 Fed. Rep. 765):

> Despite these differences in phraseology, there is a marked similarity in the characteristics attributed to street electric railways, which include them within the jurisdiction of the Commission. These characteristics are: (*a*) Being operated as a part or parts of a general steam railroad system of transportation; (*b*) engaged in the general business of transporting freight in addition to their passenger and express business; (*c*) having as its principal source of operating revenue, urban, suburban, or interurban passenger traffic, or sale of power, heat, and light, or both. In the varied instances, street electric railways, whether urban, suburban, or interurban, which do not have these characteristics, are excluded from the jurisdiction of the Commission. If they have those characteristics, obviously they would be under the jurisdiction of the Commission. This being true, does it not follow that defendant's railway, even though an interurban electric railway engaged in the interstate transportation of passengers, must be regarded as outside the jurisdiction and control of the Commission, unless it possesses one or more of these distinguishing characteristics? Before this question is answered we shall review the pertinent decisions.

The learned District Court makes no distinction between *street* electric railways and interurban electric railways, for the same reasoning is applied to both. That Court concedes, however, that if the electric company is "being operated as a part or parts of a general steam railroad system of transportation" or is "engaged in the general business of transporting freight in addition to their passenger and express business" that it is within the Interstate Commerce Act and is subject to the jurisdiction of the Commission. It is respectfully submitted that the electric company has all of these characteristics.

The learned District Court appears to have considered that the *Omaha Case* construed interurban electric companies, such as the one here involved, out of section 1 of the statute before the Act of 1910 and the Transportation Act were passed, and the various exceptions which follow to specific paragraphs in the Transportation Act were emphasis that the latter Acts did not embrace such a carrier.

Whether or not an electric *street* railway is subject to the act is decidedly not the question here. The admitted facts are that the Pennsylvania-Ohio Power & Light Company operates between two States as a common carrier by railroad of both freight and passengers. That brings it within section 1 of the Interstate Commerce Act. If it is within section 1, it can not seriously be argued that anything contained in subsequent exceptions attached to particular sections or paragraphs read it out of the whole act.

In the outset the village of Hubbard questioned the jurisdiction of the Commission. To make certain its power and authority the Commission took the evidence and made the findings which are not in controversy here. The statute does not provide the extent to which the company shall be operating as a part of a general steam railroad system of transportation or the extent to which it shall engage in the general business of transporting freight in addition to passenger and express business.

The learned District Court appears to concede that Congress did not expressly exclude "electric street and interurban railways" except in the specific instances; but the Court urges that the Congress used "other language continuously and consistently" which does exclude *all* electric street or interurban railways which do not possess certain dominant characteristics. Thus the court said (278 Fed. Rep. 768):

> It is true that Congress, in excluding electric street and interurban railways, did not use this descriptive language; but it used other language continuously and consistently, which does exclude all electric street or interurban railways which do not possess these dominating characteristics—that is to say, that are not operated as a part of a general steam railroad system of transportation or are not engaged in the general transportation of freight in addition to their passenger and express business. It seems evident that Congress intended to leave, and did leave, all street and interurban electric railways not

> thus operated, nor doing business of that character, in the situation in which they were left by the decision in the Omaha Street Railway case.

It very clearly appears that the learned District Court, instead of construing these exceptions as limited to the sections or paragraphs of which they were parts, as the Congress limited them, summarized these exceptions and construed them as applicable to the entire act. That appears to be the fundamental error underlying the whole of the opinion of the District Court. These exceptions should be construed in connection with the specific sections or paragraphs of which they form a part. Interurban electric carriers such as the one here involved were never specifically excepted from the enacting clause of the statute. The "summarizing and bringing together" of the various references to electric railways, including street and urban, are not sufficient to exempt interurban electric railways from the statute.

In *Georgia Banking Co.* v. *Smith*, 128 U. S. 174, 181, this Court, speaking through Mr. Justice Field, said:

> It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term "provided," so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be at-

> tached to the conjunction "but" or "and" in the same place, and simply serving to separate or distinguish the different paragraphs or sentences. Several illustrations are given by counsel of the use of the term in this sense, showing, in such cases, where an amendment has been made, though the provision following often has no relation to what precedes it.

See also *Chesapeake & Potomac Telephone Co.* v. *Manning*, 186 U. S. 238, 242, 243; *White* v. *United States*, 191 U. S. 545, 551; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 36, 37; *United States* v. *Whitridge*, 197 U. S. 135, 143; *United States* v. *Falk*, 204 U. S. 143, 149; *Holden* v. *Stratton*, 198, U. S. 202, 213.

The learned District Court then discusses the facts and in the following words disagrees with the Commission (278 Fed. Rep. 768):

> The remaining inquiry is whether or not, on the facts found by the Interstate Commerce Commission, the defendant railway was operated as a part of a general steam railroad system of transportation, or was engaged in the general transportation of freight, in addition to its passenger and express business. Plainly and admittedly the defendant railway was not operated as a part of a general system of steam railroads for transportation. It had two switching connections, one direct and the other over a private siding, with the New York Central, a system of steam railroads; but it was independently operated, and not as a part of that system. Its traffic relations with the

> New York Central were limited to receiving over these switches *a few carloads of inbound freight;* and, so far as the New York Central is concerned, delivery was made and demurrage began to run as soon as these cars were received by the defendant railway.
>
> Nor can it be said upon the facts found that the defendant railway was engaged in the general transportation of freight in addition to its passenger and express business. It is true that the Commission's report refers thereto as less-than-carload freight; but this freight service appears to have consisted of packages and parcels, and is more nearly like that which is called express than freight traffic. In any event, the amount thereof is exceedingly limited, not exceeding 5 per cent of the gross earnings of the defendant company. *Such an incidental and relatively insignificant and unimportant freight business can not be called the general transportation of freight in addition to its express business.*

Here the District Court throws out the 922 cars of freight received from the New York Central in 1919 and 1920, the daily interstate less-than-carload freight service, and the three days a week interstate less-than-carload service between Sharon and New Castle, Pa., via Hubbard, Ohio, as well as the participation in through freight rates to Detroit, Cleveland, Toledo, etc.

By the characterization "a few carloads of freight" and "Such an incidental and relatively insignificant and unimportant freight business can not be called

the general transportation of freight in addition to its express business," the District Court clearly substituted its judgment for that of the Commission. Moreover, this freight traffic is substantial and sufficient to bring the company within the law. In *Tap Line Cases*, 234 U. S. 1, 24, this Court said:

> It is insisted that these roads are not carriers because the most of their traffic is in their own logs and lumber and that only a small part of the traffic carried is the property of others. But this conclusion loses sight of the principle that the extent to which a railroad is in fact used does not determine the fact whether it is or is not a common carrier. It is the right of the public to use the road's facilities and to demand service of it rather than the extent of its business which is the real criterion determinative of its character. This principle has been frequently recognized in the decisions of the courts.

(B) THE FRANCHISE CONTRACTS BETWEEN THE VILLAGE OF HUBBARD AND THE PENNSYLVANIA-OHIO POWER & LIGHT COMPANY AND ITS PREDECESSOR COMPANIES MAY NOT PREVAIL AGAINST THE POWER AND AUTHORITY OF THE NATIONAL GOVERNMENT TO REGULATE INTERSTATE COMMERCE.

After holding, on authorities cited, especially those cases decided by the Supreme Court of Ohio, that the franchise contracts and ordinance grants were binding between the parties, and after observing that the principles of law announced in the decisions of this Court in the *Shreveport Case*, the *Caldwell Case*, and the *Wisconsin Rate Case* may not be applicable to the precise situation here presented,

the learned District Court then stated that the court would not rest on the decisions of those questions but that the case would be disposed of upon the question of the jurisdiction of the Commission over the company.

While the question of the binding effect of the franchise contracts and the ordinance grants is entirely separate from the question of the jurisdiction of the Commission over the company, it is obvious that the bill in equity and the opinion of the District Court treat the two subjects together. Be that as it may, conclusive against the appellee is the recent case of *State of New York* v. *United States*, 257 U. S. 591.

(C) THE VILLAGE OF HUBBARD IS WITHOUT INTEREST TO MAINTAIN THE BILL.

The cases of the *State of New York* v. *United States*, 257 U. S. 591, and *City of New York* v. *United States*, 272 Fed. Rep. 768, would seem to indicate that the village of Hubbard may maintain the present bill. The former case was heard with the *Wisconsin Rate Case* and there was no decision on the question. The case of *City of New York* v. *United States* was dismissed on the authority of *Lehigh Valley Railroad Co.* v. *Public Service Commission*, 272 Fed. Rep. 758, and the question of the right of the City of New York to maintain the bill was not decided except by inference.

The only interest the village of Hubbard asserts is the validity of its franchise contracts and ordinance

grants. Under the case of *State of New York* v. *United States*, 257 U. S. 591, their claim is utterly without merit. Similar arguments have been repeatedly overruled and it is now well established that legislative acts, municipal ordinances and orders of State commissions may not prevail against the power of the National Government to regulate interstate commerce. *United States* v. *State of Tennessee*, decided May 21, 1923.

It would therefore seem that the village of Hubbard, notwithstanding the opinion of the District Court, 278 Fed. Rep. 759, is without interest to maintain the proceeding. *Edward Hines Yellow Pine Trustees* v. *United States*, No. 91, this term.

IV.

CONCLUSION.

The Government filed a motion to dismiss the bill (1) for want of interest of the plaintiff in the controversy, and (2) for want of equity (Tr. 21). As the case in the District Court was heard and determined on the face of the bill and the report and order of the Commission were made an exhibit to the bill (Tr. 14), the decree should be reversed and the cause remanded with directions to the District Court to sustain the motion.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

JANUARY 14, 1924.

APPENDIX A.

Section 7 of the Act entitled "An Act to create a Commerce Court," etc., approved June 18, 1910, Ch. 309, 36 Stat. 539, 544, amended Section 1 of the Act of 1887, as follows:

> SECTION 1. That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment) from one State or Territory of the United States or the District of Columbia, to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the

transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however*, That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid.

The term "common carrier" as used in this Act shall include express companies and sleeping-car companies. The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, de-

livery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes, and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto.

APPENDIX B.

Section 400 of the Transportation Act of 1920 (Ch. 91, 41 Stat. 474), which amended the first four paragraphs of Section 1 of the Interstate Commerce Act as the same appear in Section 7 of the Commerce Court Act, reads as follows:

> (1) That the provisions of this Act shall apply to common carriers engaged in—
>
> (*a*) The transportation of passengers or property wholly by railroad or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or
>
> (*b*) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or
>
> (*c*) The transmission of intelligence by wire or wireless;—from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States.
>
> (2) The provisions of this Act shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply—

(*a*) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid;

(*b*) To the transmission of intelligence by wire or wireless wholly within one State and not transmitted to or from a foreign country from or to any place in the United States as aforesaid; or

(*c*) To the transportation of passengers or property by a carrier by water where such transportation would not be subject to the provisions of this act except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district.

(3) The term "common carrier" as used in this Act shall include all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such trsnsportation or transmission as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this Act it shall be held to mean "common carrier." The term "railroad" as used in this Act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated

herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "transmission" as used in this Act shall include the transmission of intelligence through the application of electrical energy or other use of electricity, whether by means of wire, cable, radio apparatus, or other wire or wireless conductors or applicances, and all instrumentalities and facilities for and services in connection with the receipt, forwarding, and delivery of messages, communications, or other intelligence so transmitted, hereinafter also collectively called messages.

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA, THE Steubenville, East Liverpool and Beaver Valley Traction Company, and Interstate Commerce Commission, appellants,
v.
THE CITY OF WELLSVILLE, OHIO. } No. 229.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT.

The appeal is from the final decree of the District Court (Tr. 49) which permanently annulled and enjoined the order of the Interstate commerce Commission (*Ohio and Pennsylvania Rates, Fares, and Charges*, 64 I. C. C. 517, (Tr. 15). The order is one of the many which followed *Ex parte 74*. The proceeding was instituted by the Commission on behalf

of the Steubenville, East Liverpool and Beaver Valley Traction Company (Tr. 7). The order is (Tr. 15):

> * * * that the * * * Company be, and it is hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference, and unjust discrimination found in said report to exist in the relation of interstate and intrastate passenger fares, and to establish, put in force, and maintain passenger fares for the transportation of passengers in intrastate commerce between points on its line within the state of Ohio found in said report to be just and reasonable for the future.

The District Court annulled the order on the ground that the traction company is not an interurban electric railway operating as a part of a general steam railroad system of transportation; nor is it engaged in the general transportation of freight in addition to its passenger and express business, and the Commission was without jurisdiction to hear and determine the controversy. (*The City of Wellsville* v. *United States*, 278 Fed. Rep. 769; *Village of Hubbard* v. *United States*, 278 Fed. Rep. 754; Tr. 33.)

The traction company operates an electric interurban line between Vanport, Pa., and Steubenville, Ohio, and intermediate points, with a local service between certain points within Ohio, and a branch line to Chester, W. Va. Passenger fares only are involved. (Tr. 7.)

The main line is double-tracked and extends along the Ohio River from Vanport west to the Pennsyl-

vania-Ohio State line; thence in a general southerly direction to Steubenville, a distance of 40.2 miles, of which 11.4 miles are in Pennsylvania and 28.8 in Ohio. The line passes through various cities, townships, villages, and boroughs, including Midland and Glasgow, Pa., East Liverpool, Wellsville, and Toronto, Ohio. (Tr. 8.) The main line was constructed upon a bench cut into the river bluffs or is supported by embankments and in many cases requires extensive masonry and retaining walls. There are also a number of streams entering the Ohio, necessitating expensive construction for bridges and culverts. (Tr. 8.) The traction company has numerous branch lines from East Liverpool and Steubenville. (Tr. 8.)

The company maintains an hourly interurban passenger service upon its main line between Vanport and Steubenville, the passengers changing cars at the diamond in East Liverpool. The company handles no baggage. Daily freight service is maintained between Steubenville and Midland, Pa., and a through car runs from Steubenville to Beaver, Pa., a point on the Beaver Valley Traction line a few miles east of Vanport, as often as the traffic demands, which at the time of the hearing was about once a week. Except for this traffic to Beaver (Tr. 8), the traction company handles only freight local to its line. No freight is handled over the branch lines. The traction company files its tariffs with the Commission and publishes interstate passenger fares between points on its line. (Tr. 9.)

At Vanport the traction company connects with the Beaver Valley Traction Company, which in turn connects with the Pittsburgh & Lake Erie Railroad at Beaver. As a result of these connections the traction company receives at Vanport full carloads of passengers destined to various points along its line. The Wheeling Traction Company transports large numbers of passengers into Steubenville from Wierton, Follansbee, Wellsburg, and Wheeling, W. Va., and from Bridgeport, Mingo, and other places on the Ohio side of the river, who avail themselves of the facilities of the traction company to reach points between Steubenville and Vanport. (Tr. 9.)

The table in the report of the Commission (Tr. 10) shows that the interstate fares between points on the line are considerably more than the intrastate fares, in some instances double, in one instance three and in another four times the amount. The Commission found that these lower intrastate fares had the effect of practically denying to the traction company the use of its interstate fares. Thus, the through interstate fare from Vanport to the terminus at Sixth Street, Steubenville, 40.2 miles, is 90 cents A passenger boarding a car at Vanport and stating his destination as State Line will pay a fare of 30 cents; he can then pay an intrastate fare of 51 cents from State Line to Steubenville, thus defeating the interstate fare by 9 cents. The interstate fare from Vanport to Woosters is 45 cents. A passenger stating his destination as State Line can pay 30 cents to that point and then

the intrastate fare of 5 cents to Woosters, defeating the interstate fare by 10 cents. The same relative situation exists going in the reverse direction from Steubenville, and examples could be multiplied.

The traffic is very heavy. The number of revenue passengers for the year ended December 31, 1920, was 3,227,652. (Tr. 12.) The traction company asserted that because of the low intrastate fares it was unable to secure sufficient revenue to pay the cost of operating and maintaining its railway and taxes thereon. It shows deficits for 1919 and 1920. (Tr. 12.)

The freight earnings reported in the traction company's annual reports under express were, in 1919, $14,864.79, and in 1920, $23,018.09. (Tr. 13.) The evidence indicates that these freight revenues exceed the freight operating expenses. The Commission did not disturb the intrastate basis of fares in effect on the company's branch or city lines. The Commission did find, however (Tr. 14): "that the interstate passenger fares * * * between Vanport and Sixth Street, Steubenville and intermediate points and designated as 'through service rates' * * * and the interstate passenger fares between East Liverpool (State Line) and the diamond in East Liverpool; between the diamond and Kountz; and between Kountz and Woosters, * * * designated 'local service rates,' are just and reasonable interstate fares for the respective services between those points; and that the mainte-

nance of intrastate fares between the same points lower than the just and reasonable interstate fares has resulted and will result in undue prejudice to persons traveling in interstate commerce, * * *; in undue preference of and advantage to persons traveling intrastate between points in Ohio; and in unjust discrimination against interstate commerce." (Tr. 14.)

The main charges in the bill of complaint are that the Transportation Act of 1920 does not confer or grant the authority claimed by the Commission and the traction company; that if it does grant such power and authority then the statute is unconstitutional in that it would deprive the city and its citizens of property without due process of law and would deprive the city of its right to enter into a franchise contract with any corporation and would set aside valid and binding contracts without due process of law.

On final hearing the District Court made permanent the preliminary injunction previously issued. The United States filed a motion to dismiss the bill (Tr. 16) and on the final hearing it pleaded no further (Tr. 49). The opinion (Tr. 33), *City of Wellsville* v. *United States*, 278 Fed. Rep. 769, adopts and follows the opinion in *Village of Hubbard* v. *United States*, 278 Fed. Rep. 754.

II.

POINTS.

(A) THE DISTRICT COURT ERRED IN HOLDING THAT THE STEUBENVILLE, EAST LIVERPOOL AND BEAVER VALLEY TRACTION COMPANY WAS NOT SUBJECT TO THE INTERSTATE COMMERCE ACTS AND THAT THE COMMISSION WAS WITHOUT JURISDICTION TO ENTER THE ORDER.

Act to Regulate Commerce, February 4, 1887 (24 Stat. 379).

Act to Regulate Commerce, June 18, 1910 (36 Stat. 539, 552).

Transportation Act of 1920, sec. 422, par. (1), (41 Stat. 488).

Transportation Act of 1920, sec. 402, par. (22), (41 Stat. 478).

Transportation Act of 1920, sec. 439, which added the new sec. 20–a (41 Stat. 494).

Transportation Act of 1920, sec. 209, par. (a) (41 Stat. 464).

Transportation Act of 1920, sec. 300, par. (1) (41 Stat. 469).

The Shreveport Case, 234 U. S. 342, 351.

American Express Co. v. *Caldwell*, 244 U. S. 617, 624.

Wisconsin Railroad Commission v. *C., B. & Q. R. R. Co.*, 257 U. S. 563.

State of New York v. *United States*, 257 U. S. 591.

Lehigh Valley Railroad v. *Public Service Commission*, 272 Fed. Rep. 758.

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Georgia Banking Co. v. *Smith, 128 U. S. 174, 181.*

Chesapeake & Potomac Telephone Co. v. *Manning*, 186 U. S. 238, 242, 243.

White v. *United States*, 191 U. S. 545, 551.

Interstate Commerce Commission v. *Baird*, 194 U. S. 25, 36, 37.

United States v. *Whitridge*, 197 U. S. 135, 143.

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Holden v. *Stratton*, 198 U. S. 202, 213.

City of East Liverpool v. *Steubenville, East Liverpool & Beaver Valley Traction Co.*, 51 I. C. C. 563.

Beall v. *Wheeling Traction Co.*, 60 I. C. C. 600.

Tap Line Cases, 234 U. S. 1, 24.

(B) THE FRANCHISE CONTRACTS BETWEEN THE CITY OF WELLSVILLE AND THE STEUBENVILLE, EAST LIVERPOOL & BEAVER VALLEY TRACTION COMPANY MAY NOT PREVAIL AGAINST THE POWER AND AUTHORITY OF THE NATIONAL GOVERNMENT TO REGULATE INTERSTATE COMMERCE.

State of New York v. *United States*, 257 U. S. 591.

(C) THE CITY OF WELLSVILLE IS WITHOUT INTEREST TO MAINTAIN THE BILL.

State of New York v. *United States*, 257 U. S. 591.

City of New York v. *United States*, 272 Fed. Rep. 768.

Lehigh Valley Railroad Co. v. *Public Service Commission*, 272 Fed. Rep. 758.

United States v. *State of Tennessee*, decided May 21, 1923.

Edward Hines Yellow Pine Trustees v. *United States*, No. 91, this Term.

III.

ARGUMENT.

(A) THE DISTRICT COURT ERRED IN HOLDING THAT THE STEUBENVILLE, EAST LIVERPOOL & BEAVER VALLEY TRACTION COMPANY WAS NOT SUBJECT TO THE INTERSTATE COMMERCE ACTS AND THAT THE COMMISSION WAS WITHOUT JURISDICTION TO ENTER THE ORDER.

In form and effect the order of the Commission is similar to those upheld in *The Shreveport Case*, 234 U. S. 342, 351; *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624; *Wisconsin Railroad Commission* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563; *State of New York* v. *United States*, 257 U. S. 591; *Lehigh Valley Railroad* v. *Public Service Commission*, 272 Fed. Rep. 758, 767; *City of New York* v. *United States*, 272 Fed. Rep. 768.

If the Steubenville, East Liverpool & Beaver Valley Traction Company is subject to the Interstate Commerce Act the decree should be reversed.

In *Omaha & Council Bluffs Street Ry. Co.* v. *Interstate Commerce Commission*, 230 U. S. 324, it was held that the Act to Regulate Commerce approved February 4, 1887 (24 Stat. 379), did not apply to *street* railroads carrying passengers between cities divided by a State Line.

In the opinion of the District Court, District Judge Westenhaver reviewed the several references to electric railways and interurban railways as found in the Interstate Commerce Act (278 Fed. Rep. 763, 767).

Section 12 of the Act approved June 18, 1910, amended Section 15 of the prior act (ch. 309, 36 Stat. 539, 552) and provided:

> * * * The Commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character, * * *.

The Congress was well aware that in 1910 and prior thereto interurban electric railways were extensively engaged in the transportation of both passengers and property in interstate commerce. In *Jurisdiction Over Urban Electric Lines*, 33 I. C. C. 536, 539, the Commission, in construing the foregoing amendment, said:

> * * * we must continue to hold, with the qualifications resulting from the decision in the *Omaha case, supra*, and the amendment to section 15 of the act to regulate commerce, which would exclude "street electric passenger railways," that electric railways engaged in interstate transportation are subject to our jurisdiction. In this connection it is worthy of note that electric lines have from time to time requested us to take jurisdiction over them with respect to various matters

arising from the application of the interstate-commerce laws.

The reports of the Commission from the earliest until now abound with cases involving the jurisdiction, power, and authority of the Commission over electric urban and interurban railways. That the Congress took notice thereof in enacting the Transportation Act can not well be gainsaid.[1]

[1] *Chicago & Milwaukee Electric Co.* v. *Illinois Central*, 13 I. C. C. 20; *Cedar Rapids & Iowa City Railway* v. *Chicago North Western*, 13 I. C. C. 250; *Southern California Sugar Co.* v. *S. P. L. A. & S. L. R. R. Co.*, 19 I. C. C. 6; *Boyle* v. *Great Falls & Old Dominion R. R.*, 20 I. C. C. 232; *Beall* v. *Washington, Alexandria & Mt. Vernon Ry.*, 20 I. C. C. 406; *Cincinnati & Columbus Traction Co.* v. *Baltimore & Ohio Southwestern*, 20 I. C. C. 486; *Citizens of Somerset* v. *Washington Railway & Electric Co.*, 22 I. C. C. 187; *Silvester* v. *City & Suburban Ry. of Washington*, 22 I. C. C. 201; *Bitzer* v. *Washington-Virginia Ry.*, 24 I. C. C. 255; *Louisville Board of Trade* v. *Indianapolis, Columbus & Southern Traction Co.*, 27 I. C. C. 499; 34 I. C. C. 640; *Virginia Highlands Citizens Association* v. *Washington-Virginia Ry. Co.*, 30 I. C. C. 593; *Milwaukee Produce & Fruit Exchange* v. *Crosby Transportation Co.*, 30 I. C. C. 653; *Damon* v. *Crosby Transportation Co.*, 33 I. C. C. 448; *City of Steubenville* v. *Tri-State Railway and Electric Co.*, 38 I. C. C. 281; *St. Louis, Missouri-Illinois Passenger Fares*, 41 I. C. C. 584; *Lourie Mfg. Co.* v. *Cincinnati Northern*, 42 I. C. C. 448; 49 I. C. C. 64; *Hartford & New York Transportation Co. Joint Rates*, 43 I. C. C. 417; *Aurora, Elgin & Chicago R. R.* v. *Indiana Harbor Belt Line*, 51 I. C. C. 331; *City of East Liverpool* v. *Steubenville, East Liverpool & Beaver Valley Traction Co.*, 51 I. C. C. 563; *Hurst* v. *Boise Valley Traction Co.*, 51 I. C. 697; *Michigan Ry. Co.* v. *Michigan Central*, 49 I. C. C. 255; *Union Traction Co.* v. *A. T. & S. F. Ry. Co.*, 52 I. C. C. 281; *Louisville Passenger Fares*, 52 I. C. C. 366; *St. Louis Electric Terminal Ry.* v. *C. C. C. & St. L.*, 55 I. C. C. 52; *Newspapers on passenger cars*, 57 I. C. C. 743; *Badger Lumber Co.* v. *A., T. & S. F. Ry. Co.*, 58 I. C. C. 97; *Chicago, Lake Shore & South Bend Ry.* v. *Director General*, 58 I. C. C. 135; *Local Fares of Hudson & Manhattan R. R.*, 58 I. C. C. 270; *Electric Railway Mail Pay*, 58 I. C. C. 455; *Chicago, Lake Shore & South Bend Ry.* v. *Director General*, 58 I. C. C. 647; *Joint Passenger Fares*, 59 I. C. C. 170; *Class & Commodity Rates of Kansas City Railways Co.*, 59 I. C. C. 382; *Cancellation of Joint Through Rates in Connection with the Missouri & Kansas Ry. Co.*, 59 I. C. C.404; *Local and Joint Passenger Fares*, 59 I. C. C. 430; *Beall v. Wheeling Traction Co.*, 60 I. C. C. 600;

The Commission's reports involving interurban electric railways embrace practically every phase of regulation provided by the Interstate Commerce Act.

The regulation of such companies had increased to such an extent that in the Transportation Act of 1920 the Congress enacted the following provisions:

Transportation Act of 1920, section 422, which added the new section 15–a, paragraph (1) (Ch. 91, 41 Stat. 488):

> When used in this section * * * the term "carrier" means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this Act, excluding (a) sleeping-car companies and express companies, (b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) *interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight*, and (d) * * *.

Commuters Club v. *Washington, Baltimore & Annapolis Electric Co.*, 61 I. C. C. 302; *Montana Rates & Fares*, 61 I. C. C. 500; *Intrastate Fares of the Chicago, North Shore & Milwaukee R. R.*, 62 I. C. C. 188; *Fares of Washington-Virginia Ry. Co.*, 60 I. C. C. 200; *City of New Albany, Indiana*, v. *Louisville & Northern Ry. & Lighting Co.*, 64 I. C. C. 468; *In re intrastate rates within the State of Illinois*, 66 I. C. C. 350; *Cancellation of class rates from Indiana to Ohio destinations*, 66 I. C. C. 449; *In re intrastate passenger fares of Chicago, Lake Shore & South Bend Ry. between points in Indiana*, 69 I. C. C. 180; *Providence Fruit and Produce Exchange* v. *Rhode Island Co.*, 69 I. C. C. 422; *Buckeye Pipe Line Co.* v. *Baltimore & Ohio*, 73 I. C. C. 19; *Hood Coal Co. v. Monongahela Valley Traction Co.*, 73 I. C. C. 54; *Michigan R. R. Co.* v. *Pere Marquette*, 74 I. C. C. 496; *Farmers, etc.*, v. *Fox & Illinois Union Ry.*, 74 I. C. C. 593; *In re intrastate rates within Illinois*, 77 I. C. C. 173.

Transportation Act of 1920, section 402, paragraph (22) (Ch. 91, 41 Stat. 478):

> The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, *which are not operated as a part or parts of a general steam railroad system of transportation.*

Transportation Act of 1920, section 439, which added the new section 20–a (Ch. 91, 41 Stat. 494):

> That as used in this section the term "carrier" means a common carrier by railroad (except a street, suburban, or interurban electric railway *which is not operated as a part of a general steam railroad system of transportation*) which is subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act.

Transportation Act of 1920, section 209, paragraph (a) (Ch. 91, 41 Stat. 464):

> When used in this section—
>
> The term "carrier" means (1) a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal control at the time Federal control terminates, * * *; but does not include a street or interurban electric railway not under Federal control at the time Federal control terminates, which has as its

> principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both.

Title III of the Transportation Act of 1920 (which created the Labor Board), Section 300, provides (Ch. 91, 41 Stat. 469):

> When used in this title—
>
> (1) The term "carrier" includes any express company, sleeping car company, and any carrier by railroad, subject to the Interstate Commerce Act, *except a street, interurban, or suburban electric railway not operating as a part of a general steam railroad system of transportation.*

Summarizing and bringing together these references the learned District Court in the *Hubbard Case* said (278 Fed. Rep. 765):

> Despite these differences in phraseology, there is a marked similarity in the characteristics attributed to street electric railways, which include them within the jurisdiction of the Commission. These characteristics are: (*a*) Being operated as a part or parts of a general steam railroad system of transportation; (*b*) engaged in the general business of transporting freight in addition to their passenger and express business; (*c*) having as its principal source of operating revenue, urban, suburban, or interurban passenger traffic, or sale of power, heat, and light, or both. In the varied instances, street electric railways, whether urban, suburban, or interurban, which do not have these characteristics, are excluded from

> the jurisdiction of the Commission. If they have those characteristics, obviously they would be under the jurisdiction of the Commission. This being true, does it not follow that defendant's railway, even though an interurban electric railway engaged in the interstate transportation of passengers, must be regarded as outside the jurisdiction and control of the Commission, unless it possesses one or more of these distinguishing characteristics? Before this question is answered we shall review the pertinent decisions.

The learned District Court makes no distinction between *street* electric railways and interurban electric railways, and the same reasoning is applied to both. That Court concedes, however, that if the traction company is "being operated as a part or parts of a general steam railroad system of transportation" or is "engaged in the general business of transporting freight in addition to their passenger and express business" that it is within the Interstate Commerce Act and is subject to the jurisdiction of the Commission. It is respectfully submitted that the traction company has all of these characteristics.

The learned District Court appears to have considered that the *Omaha Case* construed interurban electric companies such as the one here involved out of section 1 of the statute before the Act of 1910 and the Transportation Act were passed, and the various exceptions which follow to specific paragraphs in the Transportation Act were emphasis that the latter Acts did not embrace such a carrier.

Whether or not an electric *street* railway is subject to the act is decidedly not the question here. The admitted facts are that the Steubenville, East Liverpool & Beaver Valley Traction Co. operates between two States as a common carrier by railroad of both freight and passengers. That brings it within section 1 of the Interstate Commerce Act. If it is within section 1 it can not seriously be argued that anything contained in subsequent exceptions attached to particular sections or paragraphs read it out of the whole act.

To make certain its power and authority the Commission took the evidence and made the findings which are not in controversy here. The statute does not provide the extent to which the company shall be operating as a part of a general steam railroad system of transportation or the extent to which it shall engage in the general business of transporting freight in addition to passenger and express business.

The learned District Court appears to concede that Congress did not expressly exclude "electric street and interurban railways" except in the specific instances; but the Court urges that the Congress used "other language continuously and consistently" which does exclude *all* electric street or interurban railways which do not possess certain dominant characteristics. Thus the court in the *Hubbard case* said (278 Fed. Rep. 768):

> It is true that Congress, in excluding electric street and interurban railways, did not use

> this descriptive language; but it used other language continuously and consistently, which does exclude all electric street or interurban railways which do not possess these dominating characteristics—that is to say, that are not operated as a part of a general steam railroad system of transportation or are not engaged in the general transportation of freight in addition to their passenger and express business. It seems evident that Congress intended to leave, and did leave, all street and interurban electric railways not thus operated, nor doing business of that character, in the situation in which they were left by the decision in the Omaha Street Railway Case.

It very clearly appears that the learned District Court, instead of construing these exceptions as limited to the sections or paragraphs of which they were parts, as the Congress limited them, summarized these exceptions and construed them as applicable to the entire act. That appears to be the fundamental error underlying the whole of the opinion of the District Court. These exceptions should be construed in connection with the specific sections or paragraphs of which they form a part. Interurban electric carriers such as the one here involved were never specifically excepted from the enacting clause of the statute. The "summarizing and bringing together" of the various references to electric railways, including street and urban, are not sufficient to exempt interurban electric railways from the statute.

In *Georgia Banking Co.* v. *Smith*, 128 U. S. 174, 181, this Court, speaking through Mr. Justice Field, said:

> It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them to precede their proposed amendments with the term "provided," so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction "but" or "and" in the same place, and simply serving to separate or distinguish the different paragraphs or sentences. Several illustrations are given by counsel of the use of the term in this sense, showing, in such cases, where an amendment has been made, though the provision following often has no relation to what precedes it.

See also *Chesapeake & Potomac Telephone Co.* v. *Manning*, 186 U. S. 238, 242, 243; *White* v. *United States*, 191 U. S. 545, 551; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 36, 37; *United States* v. *Whitridge*, 197 U. S. 135, 143; *United States* v. *Falk*, 204 U. S. 143, 149; *Holden* v. *Stratton*, 198 U. S. 202, 213.

In *City of East Liverpool* v. *Steubenville, East Liverpool & Beaver Valley Traction Co.*, 51 I. C. C. 563, the cities of East Liverpool, Ohio, and Chester, W. Va., as complainants, invoked the jurisdiction of the Interstate Commerce Commission against this traction company and attacked the interstate passenger fares. In sustaining its jurisdiction on the complaint of those municipalities, the Commission said (p. 565):

It is argued by counsel for the city of East Liverpool that the Chester line is in fact a street passenger railway falling within that class of street railways which are excluded from the operation of the interstate commerce act under the decision of the Supreme Court of the United States in *Omaha Street Ry.* v. *Int. Com. Comm.* 230 U. S. 324. It appears that this property was originally incorporated under the laws of West Virginia as a street railway, but it is now operated as a part of an interstate carrier. The Steubenville, East Liverpool & Beaver Valley Traction Company owns 42.12 miles of road in Ohio, 11.2 miles in Pennsylvania, and 2.09 miles in West Virginia, as shown by the annual reports of the merged companies. It transports freight and passengers over its main line between Steubenville and Vanport, but does not handle commercial freight over the Chester branch. It files its tariffs with the Commission and publishes through passenger fares between Chester and all points in Ohio and Pennsylvania which it serves, and at times operates cars from its Pennsylvania stations through to Chester. It is subject to the provisions of the act to regulate commerce. *Jurisdiction over Urban Electric Lines*, 33 I. C. C. 536; *City of Steubenville, Ohio*, v. *Tri-State R. & E. Co.*, 38 I. C. C. 281. The Chester branch is an integral part of defendant's railway, and the interstate fares thereover are within the control and regulation of the Commission.

The Wheeling Traction Company, referred to in the report of the Commission (64 I. C. C. 519), on

complaint of passengers representing the traveling public, has also been held to be subject to the interstate commerce act (*Beall* v. *Wheeling Traction Co.*, 60 I. C. C. 600).

As in the case of *Village of Hubbard* v. *United States*, the District Court gave no heed to the general freight business which the traction company conducted and treated it as of even less significance.

By the characterization in the *Hubbard Case* "a few carloads of freight" and "such an incidental and relatively insignificant and unimportant freight business can not be called the general transportation of freight in addition to its express business," the District Court clearly substituted its judgment for that of the Commission. Moreover, the freight traffic in the instant case is substantial and sufficient to bring the company within the law. In *Tap Line Cases*, 234 U. S. 1, 24, this Court said:

> It is insisted that these roads are not carriers because the most of their traffic is in their own logs and lumber and that only a small part of the traffic carried is the property of others. But this conclusion loses sight of the principle that the extent to which a railroad is in fact used does not determine the fact whether it is or is not a common carrier. It is the right of the public to use the road's facilities and to demand service of it rather than the extent of its business which is the real criterion determinative of its character. This principle has been frequently recognized in the decisions of the courts.

(B) THE FRANCHISE CONTRACTS BETWEEN THE CITY OF WELLSVILLE AND THE STEUBENVILLE, EAST LIVERPOOL & BEAVER VALLEY TRACTION COMPANY MAY NOT PREVAIL AGAINST THE POWER AND AUTHORITY OF THE NATIONAL GOVERNMENT TO REGULATE INTERSTATE COMMERCE.

After holding, on authorities cited, especially those cases decided by the Supreme Court of Ohio, that the franchise contracts and ordinance grants were binding between the parties, and after observing that the principles of law announced in the decisions of this Court in the *Shreveport Case*, the *Caldwell Case*, and the *Wisconsin Rate Case*, may not be applicable to the precise situation here presented, the learned District Court then stated that the court would not rest on the decisions of those questions but that the case would be disposed of upon the question of the jurisdiction of the Commission over the company.

While the question of the binding effect of the franchise contracts and the ordinance grants is entirely separate from the question of the jurisdiction of the Commission over the company, it is obvious that the bill in equity and the opinion of the District Court treat the two subjects together. Be that as it may, conclusive against the appellee is the recent case of *State of New York* v. *United States*, 257 U. S. 591.

(C) THE CITY OF WELLSVILLE IS WITHOUT INTEREST TO MAINTAIN THE BILL.

The cases of the *State of New York* v. *United States*, 257 U. S. 591, and *City of New York* v. *United States*, 272 Fed. Rep. 768, would seem to indicate that the City of Wellsville may maintain the present bill. The former case was heard with the *Wisconsin Rate Case*, and there was no decision on the question. The case of *City of New York* v. *United States* was dismissed on the authority of *Lehigh Valley Railroad Co.* v. *Public Service Commission*, 272 Fed. Rep. 758, and the question of the right of the City of New York to maintain the bill was not decided except by inference.

The only interest the City of Wellsville asserts is the validity of its franchise contracts and ordinance grants. Under the case of *State of New York* v. *United States*, 257 U. S. 591, their claim is utterly without merit. Similar arguments have been repeatedly overruled, and it is now well established that legislative acts, municipal ordinances, and orders of State commissions may not prevail against the power of the National Government to regulate interstate commerce. *United States* v. *State of Tennessee*, decided May 21, 1923.

It would therefore seem that the City of Wellsville, notwithstanding the opinion of the District Court, 278 Fed. Rep. 769, is without interest to maintain the proceeding. *Edward Hines Yellow Pine Trustees* v. *United States*, No. 91, this Term.

IV.

CONCLUSION.

The Government filed a motion to dismiss the bill (1) for want of interest of the plaintiff in the controversy and (2) for want of equity (Tr. 16). As the case in the District Court was heard and determined on the face of the bill and the report and order of the Commission were made an exhibit to the bill (Tr. 7), the decree should be reversed and the cause remanded with directions to the District Court to sustain the motion.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

JANUARY 14, 1924.

APPENDIX A.

Section 7 of the Act entitled "An Act to create a Commerce Court," etc., approved June 18, 1910, Ch. 309, 36 Stat. 539, 544, amended Section 1 of the Act of 1887, as follows:

> SECTION 1. That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States, to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States or the District of Columbia, to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the

transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however*, That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid.

The term "common carrier" as used in this Act shall include express companies and sleeping-car companies. The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, de-

livery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto.

APPENDIX B.

Section 400 of the Transportation Act of 1920 (Ch. 91, 41 Stat. 474), which amended the first four paragraphs of Section 1 of the Interstate Commerce Act as the same appear in Section 7 of the Commerce Court Act, reads as follows:

> (1) That the provisions of this Act shall apply to common carriers engaged in—
>
> (*a*) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or
>
> (*b*) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or
>
> (*c*) The transmission of intelligence by wire or wireless; from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States.
>
> (2) The provisions of this Act shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply—

(*a*) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid;

(*b*) To the transmission of intelligence by wire or wireless wholly within one State and not transmitted to or from a foreign country from or to any place in the United States as aforesaid; or

(*c*) To the transportation of passengers or property by a carrier by water where such transportation would not be subject to the provisions of this act except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district.

(3) The term "common carrier" as used in this Act shall include all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this Act it shall be held to mean "common carrier." The term "railroad" as used in this Act, shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated

herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "transmission" as used in this Act shall include the transmission of intelligence through the application of electrical energy or other use of electricity, whether by means of wire, cable, radio apparatus, or other wire or wireless conductors or appliances, and all instrumentalities and facilities for and services in connection with the receipt, forwarding, and delivery of messages, communications, or other intelligence so transmitted, hereinafter also collectively called messages.

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